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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CUNNINGHAM, Petitioner, v. **JOHN MARSHALL, Warden,** Respondent.	07cv2183 DMS (RBB) **OPPOSITION TO PETITIONER'S REQUEST FOR STAY AND ABEYANCE**

Petitioner has filed a First Amended Petition and requests a stay of federal proceedings so that he may exhaust his state court remedies. Respondent opposes any stay because Petitioner has failed to show good cause for his failure to exhaust his unexhausted claims in the state courts.

INTRODUCTION

Petitioner was sentenced to twelve years state prison after being convicted of assault with a firearm; possession of a firearm by a felon; and possession of a deadly weapon, with a true finding that he personally used a firearm during the commission of the assault. Petitioner admitted that he had two prior convictions. (Lodgment 1 at 11, 113, 116.)[1]

On or about September 21, 2005, Petitioner filed an opening brief in the California Court of Appeal, Fourth Appellate District, Division One. (Lodgment 3.) Respondent also filed a brief. (Lodgment 4.) On March 9, 2006, the California Court of Appeal, Fourth Appellate District, Division One, affirmed Petitioner's conviction in case number D046320. (Lodgment 5.)

On or about April 5, 2006, Petitioner filed a petition for review in the California Supreme Court. (Lodgment 6.) On October May 17, 2006, the petition was denied. (Lodgment 7.)

On April 9, 2007, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (Lodgment 8.) On August 22, 2007, the petition was denied, with citations that indicated the claims therein were procedurally barred, i.e., "*In re Waltreus*, 41 Cal. 2d 756 (1953); *In re Swain*, 34 Cal. 2d 300, 304 (1949); *People v. Duvall*, 9 Cal. 4th 464, 474 (1995); *In re Lindley*, 29 Cal. 2d 709 (1947)". (Lodgment 9.)

On November 13, 2007, Petitioner filed a Petition for Writ of Habeas Corpus in this Court, wherein he presented four grounds for relief: in Ground one, Petitioner asserted the trial court committed evidentiary error; in Ground two, he asserted he was denied his right to confront a witness; in Grounds three and four, he claimed the trial court committed instructional error. Petitioner also filed a Motion for Stay and Abeyance of Federal Habeas Corpus Petition to Exhaust Additional Unexhausted Claims in the State Courts. On November 27, 2007, the motion was denied without prejudice.

On January 28, 2008, Petitioner submitted a renewed Motion for Stay and Abeyance of Federal Habeas Petition, which was filed *nunc pro tunc* to January 9, 2008. On February 21, 2008, the motion was denied without prejudice, because Petitioner did not identify the claims he wanted to assert and stated only that there were "newly-discovered trial errors . . . ." (See Order.)

On February 25, 2008, Respondent filed an Answer asserting Petitioner's four claims were meritless. Petitioner subsequently submitted a First Amended Petition, asserting six grounds for

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1. The lodged documents referred to herein were previously lodged with Respondent's Answer.

relief, which was filed *nunc pro tunc* to March 3, 2008. Attached to the First Amended Petition, is Petitioner's third Request for Stay and Abeyance of Petitioner's Federal Habeas Petition to Exhaust Several unexhausted claims in State Court.

On March 3, 2008, Petitioner filed a second petition for writ of habeas corpus in the California Supreme Court in case number S161389.[2]

On March 21, 2008, this Court filed an Order Requiring Respondent to File an Opposition to Petitioner's Request for Stay and Abeyance.

PETITIONER'S REQUEST FOR STAY AND ABEYANCE SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO SHOW GOOD CAUSE FOR HIS FAILURE TO EXHAUST HIS UNEXHAUSTED CLAIMS

A. Background

Comparison of the original Petition to the Motion to Amend demonstrates that Petitioner has failed to show good cause for his failure to exhaust his unexhausted claims.

In the original Petition, Petitioner asserted four grounds for relief, in Ground one, Petitioner asserted the trial court committed evidentiary error; in Ground two, he asserted he was denied his right to confront a witness; in Grounds three and four, he claimed the trial court committed instructional error.

In the First Amended Petition, Petitioner asserts six grounds for relief, In Grounds one, two, and three, he claims trial counsel was ineffective; in Ground four, he claims he was denied his right to confront a witness; in Grounds five and six, he claims the trial court committed instructional error.

Petitioner argues he is entitled to a stay because, although he acted diligently, he did not discover his three claims of ineffective assistance of trial counsel, because he has a fifth grade education and suffers from a mental disorders. (First Amend. Pet. at 5.) He also faults appellate counsel for failing to raise these claims on direct appeal, and asserts that the claims were unknown to him until after state habeas proceedings were terminated and they were discovered by a fellow

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2. To date, the petition is still pending.

inmate. (First Amend. Pet. attach. Ex. H at 89.)

The United States Supreme Court has made it clear that the exhaustion rule is a *total* one: every claim in a federal habeas petition must be properly exhausted before any of the claims contained in the petition can be considered. *See Rose v. Lundy*, 455 U. S. 509, 518-19, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). *See also Jefferson v. Budge*, 419 F.3d 1013, 1015 (9th Cir. 2005) (under *Rose*, a petition raising both exhausted and unexhausted claims must be dismissed).

When petitions are found to be "mixed," petitioners must be given the opportunity to amend their petitions to delete the unexhausted claims and proceed only with the exhausted claims. *Rose*, 455 U.S. at 510, 102 S. Ct. at 1199 (the district court must give a petitioner the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims"). "[A] federal habeas prisoner has a right to amend a mixed petition to delete unexhausted claims as an alternative to suffering a dismissal." *James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

Additionally, in appropriate "limited circumstances" in which there was "good cause for the petitioner's failure to exhaust his claims first in state court," a district court has the discretion to stay a "mixed" petition while the petitioner returns to state court to fairly present his unexhausted claims. *Rhines v. Weber,* 544 U.S. 269, 275-77, 125 S. Ct. 1528, 1534-35, 161 L. Ed. 2d 440 (2005). *See also Jackson v. Roe*, 425 F. 3d at 654, 659-61 (9th Cir. 2005).

B. Petitioner Has Failed to Demonstrate Good Cause for a Stay

Petitioner's explanation for his failure to exhaust state remedies before filing his the First Amended Petition should be deemed insufficient.

First, Petitioner's alleged illiteracy, i.e., only a fifth grade education, does not constitute good cause. *See Allen v. Scribner*, No. 07-CV-1746-H(AJB), 2008 WL 686808, at *5 (S.D. Cal. Mar. 11, 2008) (petitioner's lack of legal knowledge did not constitute good cause for failure to exhaust claims); *Smith v. Giurbino*, No. 06CV700 IEG (CAB), 2008 WL 80983 at, *2 (S.D. Cal. Jan. 7, 2008) (same).

Second, Petitioner asserts that appellate counsel failed to raise any claim of ineffective assistance of trial counsel on direct appeal. Other than claiming that he was unaware of such claims until they were pointed out by a fellow inmate, Petitioner has failed to show that he was unable to assert such claims in his previous habeas petition filed in the California Supreme Court. Moreover, as there is no Constitutional right to counsel in habeas proceedings, appellate counsel cannot be faulted for the absence of these claims in Petitioner's first habeas petition filed in the state court. *Allen v. Scribner*, 2008 WL 686808 at *5 (S.D. Cal. Mar. 11, 2008) citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Miranda v. Castro*, 292 F.3d 1063, 1067 (9th Cir.2002).

Under *Rhines v. Weber*, a federal court may stay a mixed petition if there is good cause. But the Supreme Court has not defined good cause. The Ninth Circuit, in *Jackson v. Roe,* 425 F.3d 654 (9th Cir. 2005) suggested that good cause is less stringent than the extraordinary circumstances required to warrant equitable tolling. Some district courts have applied a definition of cause similar to that required to overcome a procedural default. Such a "cause" is an objective factor, external to the defense, that gave rise to the default. *See Hernandez v. Sullivan*, 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005). Other district courts have applied a more lenient standard. *See Webb v. Pliler*, 2006 WL 191944 (E.D. Cal. Jan. 24, 2006). In other circumstances, the Ninth Circuit has required a showing of diligence to demonstrate good cause. *Zivkovic v. Southern California Edison Co*, 302 F.3d 1080, 1087-88 (9th Cir. 2002). Ignorance of the law or carelessness is not compatible with diligence. *Townsel v. Contra Costa County*, 820 F.2d 319, 320-21 (9th Cir. 1987).

Petitioner's explanations fail to demonstrate good cause because he has failed to demonstrate either diligence or that some factor, other than his lack of education and assigned blame to appellate counsel, caused the delay of rasing the unexhausted claims. Out another way, "Petitioner's situation is certainly not the type of limited circumstance warranting the stay and abeyance of his federal Petition." *Allen v. Scribner*, 2008 WL 686808 at *5, citing *Rhines v. Weber*, 544 U.S. at 277. Accordingly, this Court should deny Petitioner's request for a stay.

Dated: April 16, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Cunningham v. Marshall**
No.: **07cv2183 DMS (RBB)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 16, 2008, I served the following documents:
OPPOSITION TO PETITIONER'S REQUEST FOR STAY AND ABEYANCE
by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

James H. Cunningham
V-72323
California Men's Colony
PO Box 8101
San Luis Obispo, CA 93409

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case: None

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing): James H. Cunningham at the above-named address.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 16, 2008, at San Diego, California.

Anna Herrera	Anna Herrera (signature)
Declarant	Signature

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